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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 499.

THE COLEMAN COMPANY, INC., PETITIONER AND APPELLANT BELOW,

VS.

CLETA S. GRAY AND A. L. GRAY, RESPONDENTS AND APPELLEES BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

HOWARD T. FLEESON,
WAYNE COULSON,
PAUL R. KITCH,
of Wichita, Kansas,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action is one in tort brought by the purchaser of a gasoline iron to recover from the manufacturer damages

for injuries sustained when respondent was burned as a result of the ignition of gasoline vapor which escaped from the iron (R. 2).

The iron is illustrated at pages 151 and 152 of the record. The court will observe above the gasoline tank an assembly called the filler plug assembly. It consists of three parts. The uppermost part is a threaded part called an air stem (R. 26, 66, 102). Below it is a part described in the complaint as a "ball check" (R. 2) and in the evidence as a "check body" (R. 32, 37). The third portion of the assembly is a threaded gasket by means of which the cheek body is attached to the top of the gasoline tank (R. 151, 152).

To fill the tank the entire filler plug assembly is removed in one operation by unscrewing the filler plug gasket. Gasoline is then poured into the tank through a funnel (R. 151). The filler plug is then replaced and the filler plug air stem loosened one full turn. A small hand pump is then applied to the top of the air stem and eight full quick strokes of the pump applied. The air stem is then tightened with the fingers. After lighting, the air stem is again loosened and four or five additional strokes of the pump applied. The air stem is then firmly screwed tight with the fingers (R. 151).

The part alleged to be defective is the check body. This part consists of a hollow brass rod containing a small brass ball. After the ball is placed in the hollow rod the lower end of the rod is indented by a press which forces three stakes inward into the body to contain the ball (R. 33). The air stem screws into the upper end of the check body (R. 80).

When there is no pressure within the gasoline tank the ball lies at the bottom of the check body. In the

pumping operation when sufficient air is forced into the tank the ball is forced to the top of the check body where it impedes the escape of air outward, thus permitting the tank to be pumped up (R. 38-49). The purpose of the check body was stated by respondents' expert witness Means as follows:

> Q. All right. Mr. Means, what do you consider to be the functions and purposes of the air stem and check body? A. The airstem which screws into the top of the check body is intended to be the opening and the point of application of the pump. It also is intended to be the permanent seal on the top of the tank. The check body with the ball in the ball cavity are intended to allow air to enter the fount and *not at the same time* allow air or gasoline in any appreciable quantity to come out (R. 80).

It was alleged that the check body was defective in that occasionally the ball would become stuck against the stakes at the bottom of the check body in such position that gasoline vapor could pass around it if the air stem should be removed (R. 2).

The jury was entitled to disbelieve petitioner's evidence. We therefore confine our statement of the evidence to that produced by respondents. Respondent Cleta S. Gray testified:

She pumped up the iron, carefully following the printed instructions (R. 24). After pumping up the iron she screwed the air stem down firmly with her fingers. She did not thereafter loosen the air stem and so far as she knew she never touched it (R. 26, 28). She knew that it was necessary for the air stem to be screwed in to prevent air from escaping. She knew also that the iron operated under air pressure applied against the gasoline in the tank which drove the gasoline into the manifold (R. 26).

She used the iron for two and one-half hours without pumping it again (R. 25, 26). When she finished ironing plaintiff set the iron on its stand and turned it off by closing the valve wheel at the back of the iron and then turned the cleaning needle out (R. 23, 27). She then folded a pair of overalls, hung them on a chair, and walked back to the iron to pick it up and carry it to the kitchen (R. 23). She took hold of the handle, but had not lifted the iron from the stand when fire and gas came out of the top burning her arm (R. 23, 27). She returned to the iron, but didn't get to it when more fire and gas sprayed on her catching her on fire (R. 23, 27). The iron was making a hissing noise (R. 29).

The fire seemed to be coming out of the top of the gasoline tank and from nowhere else (R. 24, 28, 29). Plaintiff was dizzy and everything seemed slanted including the iron. It seemed as though the air stem was on at sort of a kilter angle, but everything seemed all slanted over and she might have seen it that way or might not have (R. 29, 31). The iron remained standing upright at all times (R. 29, 31).

Billy Doyle Gray, respondents' son, testified that he threw the burning ironing board out of doors and that on the following day he found the air stem of the iron lying on a table which had been located about eighteen inches from where the ironing board had been standing (R. 31, 32).

Respondents' principal witness was an expert, Eldon R. Means, who testified:

He is a consulting chemist who operates a testing laboratory in Wichita (R. 41). He was employed by plaintiff to make an examination of the iron in question. Plaintiff's counsel furnished him with an account of the fire

"We attempted to find out if there was anything about the structure or operation of the iron which could and would fit into the—explain the situation as it was described to me" (R. 42).

Mr. Means constructed an apparatus which applied ten pounds of air pressure to the ball in the check body of the iron, first in one direction then in the opposite direction, thus driving the ball back and forth in the check body at intervals of approximately one second (R. 29-51). The ball was thus propelled back and forth 10,000 times (R. 43). In the course of those 10,000 journeys of the ball back and forth in the check body the ball became stuck against the stakes at the bottom of the check body four or five times (R. 98). When the ball became stuck it remained stuck through several cycles, sometimes as many as fifty, sixty or a hundred (R. 62). In all the ball was stuck at the bottom of the check body during 348 of the 10,000 cycles (R. 59). The ball had been propelled back and forth more than 1,000 times before it became stuck for the first time (R. 85).

After making this test Mr. Means cut the check body in two and made a microscopic examination of it (R. 60). This examination showed a depression where the ball had been striking the stakes. On each side of the depression ridges could be seen which were a result of the drilling operation which produced the hole in the brass rod before the stakes were made. He could see the point at which the ball had been striking the ridge and could tell that the ball had gone over the ridge (R. 61, 62).

Mr. Means drew the conclusion that "the ball would stick against the stakes to the fact that there was a ridge on the stake faces over which the ball would slide and be held momentarily until sufficient pressure was exerted from the opposite direction to release it" (R. 62).

Mr. Means recorded the temperature of the gasoline in a Coleman iron after use. He found that after the iron had been burning for thirty minutes the gasoline reached and thereafter maintained a temperature of 165 degrees Fahrenheit. Gasoline in an open vessel boils and vaporizes at 100 degrees Fahrenheit. In a closed vessel pressure increases when the temperature goes above 100 degrees. At 150 degrees the vapor pressure of gasoline in a closed container is approximately forty pounds. Upon releasing the stopper to a container of gasoline at 150 degrees the gasoline will boil at all points from the bottom of the tank upwards. "It will come upward tending to expand those vapors which now, after release of pressure, are above their boiling point" (R. 78-80).

The air stem in a Coleman iron becomes tighter as the iron heats. The stem becomes tighter from the heat. In addition, the hotter the tank becomes the greater is the air and gas pressure inside it. That pressure is exerted equally in all directions and the more pressure there is exerted on the bottom of the air stem the tighter the stem becomes in the threads (R. 77, 91).

The retainer ring which prevents the valve wheel from becoming completely unscrewed was missing from the iron in question. With the ring present the valve wheel cannot be completely unscrewed, but with it absent it can be (R. 93-95). The pressure against the valve wheel is the same as the pressure against the air stem (R. 96-97). If the valve wheel should be unscrewed there would be a continuous spray of gasoline and vapor through the opening until the pressure within the tank was completely exhausted (R. 97).

In answer to a hypothetical question Mr. Means testified:

"I believe that the iron, after having operated for that period of time, had sufficient temperature, pressure within the fount, and that the last time that she pumped the iron the check valve, the ball in the check valve stuck in the stake at the bottom; that she screwed the air stem down, thus it acting as a permanent seal retaining the pressure within the tank. That at the end of her ironing the air stem became loosened and as she reached for the iron it came open and gasoline came out of the top and was ignited either by the flame in the iron which could have been burning at the end of that length of time and after she turned it off, for it does persist, or from the kerosene lamp on the table. A fire, that is the condition, that the fire burning from the top of the fount could only be explained in terms of gasoline and gasoline vapor coming from the top of the fount, and those are, in my opinion, reasonable basis to believe that that is what happened.

"Mr. Kitch: If Your Honor please, we object to the witness' answer and move that it be stricken and the Jury instructed to disregard it for the reason that it obviously is based upon the premise that the air stem became loosened and there is no evidence in the record upon which to base such an assumption.

"The Court: The witness has obviously made an assumption in addition to that propounded in the hypothetical question, however, the Court thinks it will let the answer stand" (R. 83).

If the air stem was tightened down nothing could come out of the top of the tank. With the air stem tightened down the ball check could not have participated in the accident even if the ball had been stuck at the bottom of the check body (R. 98).

In cross-examining the witness counsel for petitioner inquired if the witness had a record of his tests. He stated that his only record was a report made to respondents' counsel. Upon request the witness produced the report

from his pocket and handed it to counsel for petitioner. Upon objection by respondents' counsel the court ordered the report returned to the witness (R. 84-85).

The trial resulted in a judgment upon the verdict of a jury in favor of respondents for $35,000 (R. 7).

Within due time petitioner filed a motion for a new trial, one of the grounds of which was the trial court's refusal to permit petitioners' counsel to examine the written report of the witness Means (R. 7-10).

Upon the hearing of petitioner's motion for a new trial Mr. Means called as a witness, testified:

> Q. And that report was the only written record which you made of the investigation and examination and experiments which you conducted. A. That is the only remaining record. I have some notes—I have a few pencilled notes here, etc., but the only record primarily that existed, yes.
>
> Q. And your testimony at the time of the trial then was based upon your recollection of the work which you had done some months before. A. It was based upon the report that I had read to refresh my memory and upon the recollection, yes.
>
> Q. In other words, then, you made use of that report to refresh your recollection during the time of trial. A. I certainly read the report.
>
> Q. And your testimony in part was based upon your refreshed recollection from the instrument. A. My testimony was based upon my recollection.
>
> Q. As refreshed by the written report. A. Certainly.
>
> Mr. Kitch: You may step down. Just a second, please.
>
> Q. (By Mr. Kitch) How many copies of this original report did you make? A. I believe two or three; I am not sure.

Q. The fact of the matter is it was three, wasn't it? A. I am not sure. I really don't recall.

Q. And when—did you mail all copies of that to Mr. Blaes? A. No.

Q. You kept a copy, did you? A. I had a copy probably at the time of the trial; I think I had.

Q. Yes. And you had that copy in your possession up until the time of the trial. A. Yes (R. 159-160).

Over the strenuous objection of counsel for respondents (R. 159, 160-162), the trial court required production of the report (R. 162) and it was offered in evidence as Joint Exhibit 14-F (R. 156).

The report contains the following statements:

> Calculations based upon measurements of the ridge height, areas, etc., indicates that for the size ball which operated in this check valve the total force to dislodge the ball, once it has slipped over the ridge, is approximately one-half pound. Since the ball weighs only a very small fraction of this, obviously it could not tip out or fall out by itself.
>
> The total pressure required to force this ball back up the stem into its normal position calculates to be *seven and one-half pounds per square inch* (R. 157, 158).

The witness had testified during the trial that the pressure within the tank exceeded forty-six pounds per square inch (R. 120) and that upon removal of the air stem the gasoline would boil upward at all points from the bottom of the tank and "it will come upward tending to expand those vapors which now after release of pressure, are above their boiling point (R. 78-80).

The report disclosed that the theory upon which plaintiff had been permitted to go to the jury was a physical impossibility. Obviously, the ball couldn't remain stuck

against the stakes at the bottom of the check body when subjected to more than forty-six pounds pressure per square inch, since only one-half pound of pressure was required to dislodge it once it became stuck and only seven and one-half pounds of pressure per square inch was required to force it back up to the top of the check body.

The trial court overruled respondents' motion for a new trial and the Court of Appeals affirmed the judgment (R. 10, 172).

In affirming the judgment the Court of Appeals in its opinion stated:

> "During the trial it developed that the expert witness for plaintiffs had made a confidential written report of his investigation to counsel for the plaintiffs. Counsel for Coleman requested that they be permitted to examine such report. The court refused the request. *The expert witness did not use the report to refresh his recollection while testifying.* For that reason the authorities relied on by Coleman are not applicable here, and the request was properly denied."
>
> (R. 171.)

The opinion of the Court of Appeals is set out in the record at page 167. It has not yet been reported. Judgment affirming the judgment of the trial court was entered in the Court of Appeals on October 20, 1951 (R. 172).

JURISDICTIONAL STATEMENT.

It is contended that the Supreme Court of the United States has jurisdiction to review the judgment in question under Title 28, Section 1254 of the United States Code.

THE QUESTION INVOLVED.

Where a party's entire case rests upon the testimony of an expert witness, who, during the trial, refreshed his recollection by his own written memorandum, which, if produced, would have shown the theory upon which the party went to the jury to have been a physical impossibility, is the adverse party entitled to a new trial because of the trial court's denial of an opportunity to inspect the report and to cross examine the witness thereon?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

Under both the Federal and the Kansas rule a party has the right to examine memoranda used by an adverse witness during the trial to refresh his recollection (*United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150; *Fifth Avenue-Fourteenth Street Corp.* v. *Commissioner*, 2 Cir., 147 F. 2d 453; *A., T. & S. F. R. Co.* v. *Hays*, 8 Kan. App. 545, 54 Pac. 322).

One of the reasons for the rule is stated to be " 'to detect circumstances not appearing on the surface' and 'expose all that detracts from the weight of testimony' " (*United States* v. *Socony-Vacuum Oil Company, supra*, quoting from Wigmore, Evidence, 2d Ed., Sec. 762).

The witness Means testified positively that his testimony "was based upon the report that I had read to refresh my memory and upon the recollection" (R. 160) and that he read the report for that purpose "during the time of trial" (R. 160).

We regard the statement in the opinion of the Court of Appeals that "the expert witness did not use the re-

port to refresh his recollection while testifying" (R. 172) as clearly erroneous. If we are correct in this view the decision of the Court of Appeals is in direct conflict with the decisions of this court, of the Court of Appeals for the Second Circuit and with the Kansas decision, all above cited.

If the record is subject to a construction that the witness Means only used the report out of court to refresh his recollection the decision of the Court of Appeals is probably in conflict with the decision of this court in *Goldman* v. *United States,* 316 U. S. 129, in which the court said:

> "We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to inspect them. Where, as here, they are not only the witness notes but are also part of the Government's files, a large discretion must be allowed the trial judge."

This decision has been construed, correctly we think, to require production of the memoranda if a party can show actual prejudice by denial of an opportunity of inspection. *Cantoral* v. *Mathiasen's Tanker Industries, Inc.,* (D. C.) 94 F. Supp. 871.

In the case at bar prejudice to the petitioner, defendant in the trial court, certainly reached the maximum. Respondent went to the jury solely upon the opinion evidence of her expert witness Means that the ball had stuck at the bottom of the check body allowing passage of the vaporizing gasoline around the ball and out the top when the air stem became unscrewed in some unknown fashion. His report when finally produced on the hearing of the motion for a new trial showed this theory to have been physically impossible with the ball subjected to many

times the pressure he found necessary to free the ball and force it to the top of the check body once it had become stuck.

The witness had made tests upon a check body which petitioner was unable to duplicate because the witness had destroyed the check body by cutting it in two (R. 60-62). Cross-examination was the only means by which petitioner could check the accuracy of the conclusions the witness drew from those tests. The denial of petitioner's demand for inspection of the report effectually limited petitioner's cross-examination because of lack of factual data upon which to proceed. The denial of the right of inspection prevented petitioner from detecting the most material "circumstances not appearing on the surface" and from exposing "all that detracts from the weight of the testimony." In short the denial of the right of inspection enabled the witness to mislead the jury.

"Rule 43 illustrates the modern trend which is to admit in evidence any matter which throws light on the controversy" (2 Barron and Holtzoff, Federal Practice and Procedure, p. 677, citing *United States* v. *25.406 Acres of Land*, 4 Cir., 172 F. 2d 990). The decision of the court below is not in harmony with that trend nor with the spirit of the Rules of Civil Procedure.

The decision of the Court of Appeals is evidence that further enlightenment from this court is needed to guide the trial courts in the exercise of their discretion as to the circumstances under which a party is entitled to an inspection of memoranda used by a witness to refresh his recollection. Some further guide is needed to secure uniformity of procedure in accordance with not only the letter but the spirit of the Rules of Civil Procedure.

PRAYER.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said the United States Court of Appeals for the Tenth Circuit had in the case numbered and entitled on its docket, No. 4223, *The Coleman Company, Inc., appellant,* v. *Cleta S. Gray and A. L. Gray, appellees,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment of said United States Court of Appeals be reversed by the court and a new trial ordered; and for such further relief as to this court may seem proper.

Dated December 22, 1951.

HOWARD T. FLEESON,
WAYNE COULSON,
PAUL R. KITCH,
of Wichita, Kansas,
Counsel for Petitioner.

FILED
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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

No. 499

THE COLEMAN COMPANY, INC., PETITIONER AND APPELLANT BELOW,

VS.

CLETA S. GRAY AND A. L. GRAY, RESPONDENTS AND APPELLEES BELOW.

BRIEF OF RESPONDENTS

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RESPONDENT'S

BRIEF

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BRIEF OF RESPONDENTS

(Since petitioner's brief was printed, the opinion below has been printed and now appears as *Coleman Co., Inc. v. Gray*, et al, 192 F, 2d 265).

This case was fully considered by Chief Justice Phillips on appeal to the Court of Appeals for the Tenth Circuit and his opinion for the unanimous court affirms the general verdict which the jury rendered in favor of respondents. This petition is an example of a litigant refusing to be bound by the record in an attempt to upset a general ver-

dict. Respondent will cite no additional authorities since those which petitioner has cited are believed to contain a correct statement of the law, which, if properly applied to the facts of the present case, would preclude the relief petitioner seeks.

Petition for writ of certiorari should be denied because:

1. Respondent's case went to the jury with many indications of petitioner's negligence in addition to the expert testimony now being questioned on this petition.

2. During the trial, respondent's expert witness did not use his written report to refresh his recollection and petitioner's legal authorities are correct but misapplied.

3. There was no inconsistency in the expert's report showing respondent's theory to be a "physical impossibility."

I.

RESPONDENT'S CASE WENT TO THE JURY WITH MANY INDICATIONS OF PETITIONER'S NEGLIGENCE IN ADDITION TO THE EXPERT TESTIMONY NOW BEING QUESTIONED ON THIS PETITION.

There were many items of both direct and inferential evidence on the point of petitioner's negligence in the present case. They were all consistent with respondent's theory of the source of the flame. However, from the petitioner's statement of the question involved on page 11 of its brief it would seem that the "entire case" rested upon the testimony of respondent's expert witness. In fact his testimony proved merely supplementary to the many other indications of petitioner's negligence.

Additional proof of such negligence consistent with respondent's theory is shown on the record in the following instances:

A. There was direct evidence of the respondent that fire came from the opening at the top of the gasoline tank (R. 24,27). According to petitioner's own witness, the correct functioning of the mechanism would not allow such a flame to escape (R.108).

B. The air stem was found separate from the iron after the fire (R. 32).

C. Petitioner's design engineer testified that a malfunction of the ball check would result in a "rapid little hissing" (R. 118). The respondent, Cleta S. Gray, had previously testified that " the iron was making a hissing noise when it first started out . . ." (R. 29). Thus the respondent subconsciously and at a prior time used the identical description of the malfunction which petitioner's own expert witness later used.

D. It was a inferable fact that the ball did not operate normally within the ball check when the respondent was unsuccessful in pumping air into the iron when it was first attempted to be used. Chief Judge Phillips in his opinion, (p. 267) comments upon this circumstance as warranting "the inference that the ball did not then operate normally."

E. It was a physical fact that the respondent, Cleta S. Gray was burned severely on the right wrist at a point which in operation would normally be immediately over the aperture from which the flame emitted (R. 155). Respondent, Cleta S. Gray, demonstrated to the jury the manner in which she held the iron while using it (R. 25). By observation the jury was entitled to the conclusion which it adopted concerning the source of the flame which injured respondent.

F. A microphotograph introduced as Exhibit 8A at the trial disclosed the ridge against which the ball became stuck on the face of the stakes (R. 153).

II.

DURING THE TRIAL RESPONDENT'S EXPERT WITNESS DID NOT USE HIS WRITTEN REPORT TO REFRESH HIS RECOLLECTION AND PETITIONER'S LEGAL AUTHORITIES ARE CORRECT BUT MISAPPLIED.

It is readily apparent from only a casual reading of the record that the expert witness did not refresh his recollection by his own written memorandum. For proof of this statement, the entire record on this point is as follows:

"Q. Do you have your record here with you showing your count made on those ten thousand tests?

A. I think it has been introduced.

Q. May I see it?

Mr. Kitch: Mr. Blaes, do you have such an exhibit?

Mr. Blaes: I was going to inquire. I don't think there has been any written exhibits introduced of the count.

A. No.

Q. (By Mr. Kitch) Did you make a record at the time of what your tests revealed?

A. Yes.

Q. Do you have it with you?

A. I reported it to Mr. Blaes, yes.

Q. Will you produce it?

A. I made a report to —.

Mr. Blaes: He made a report to me.

A. I made a report to Mr. Blaes.

Mr. Kitch: May I have it, please?

Mr. Blaes: Your Honor, we object to counsel having the report which was given to us. We have introduced our evidence on the point. I don't know what counsel is trying to get at but that was a report made to us and we were not favored with similar engineering reports from their engineers to their counsel and we object to their taking our report.

Mr. Kitch: If Your Honor please, any written report that we have that they desire of the material certainly they are welcome to it.

The Court: Well, I would not require the witness to submit to you the report. He seems to have done so voluntarily.

A. I did so under the impression that I was required to.

Mr. Kitch: Well, do you want me to see the written report which you made of your examination?

A. That is up to Mr. Blaes. That report was written and given to him as a confidential report. It belongs to him. It does not belong to me.

Q. Well, is there anything in there that the Court and Jury shouldn't know?

A. That is up to Mr. Blaes.

Mr. Blaes: That, Your Honor, we object to as improper cross examination.

The Court: The document may be returned to the witness.

Mr. Kitch: All right.

Q. Did you make any written memorandum at the time of this so called test?

A. I don't believe so. The ball stuck 34 times out of 10,000 tests. I made no written record at the time . . . " (R 84,85)

The foregoing record was before the Court of Appeals and Chief Judge Phillips accurately concluded that "the expert witness did not use the report to refresh his recollection while testifying. For that reason the authorities relied on by Coleman are not applicable here, and the request was properly denied." (p. 268 of the opinion)

In order to establish a factual basis upon which to urge the point of law involved, petitioner cites only the testimony of the expert witness at the time of the motion for new trial where in answer to persistent leading questions by petitioner the expert witness indicated that he had read his report to refresh his memory in testifying. By comparison with the above portion of the record it is easy to see that such later recollection was not accurate. The trial court's ruling was correct because the witness had not in fact used any memorandum to refresh his recollection while testifying. This ruling was specifically affirmed on appeal.

Under no circumstances can the petitioner's statement at the bottom of page 7 of its brief be justified. It is said that "upon request, the witness produced the report *from his pocket* and handed it to counsel for petitioner." (emphasis supplied) In an attempt to warp the facts grossly beyond

the record, such statement is actually contained in petitioner's brief with a purported citation "(R. 84-85)" The record in fact shows that the report in question was in the possession of respondent's counsel and by no stretch of the imagination was the witness testifying by refreshing his memory from written notes before him.

Had the petitioner desired to obtain the particular report, the Federal Rules of Civil Procedure provide adequate methods by which such a report could have been made available upon discovery process. Not having utilized discovery procedure, it is extremely inappropriate for petitioner's counsel to attempt discovery during trial. The trial judge correctly withheld the written report from petitioner's counsel and Chief Judge Phillips accurately concluded that the witness did not use the report to refresh his recollection while testifying.

If the legal authorities cited by petitioner are correctly applied, petitioner had no absolute right to inspect the confidential report rendered by the expert witness to respondent's counsel.

Goldman v. United States, 316 U. S. 129, is directly in point, where Mr. Justice Roberts on page 132 states:

> "We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them."

III.

THERE WAS NO INCONSISTENCY IN THE EXPERT'S REPORT SHOWING RESPONDENT'S THEORY TO BE A "PHYSICAL IMPOSSIBILITY."

Petitioner argues that respondent prevailed with a theory that was a "physical impossibility." This is asserted because of certain calculations appearing in the expert's report dealing with pressures sufficient to dislodge the ball and testimony at the trial concerning tank pressure.

Though the argument may sound logical as stated by petitioner, the record is again misquoted to establish a factual basis for such an argument. There are the following errors in the major premise:

A. The tank pressure was said to be forty-six pounds *per square inch* whereas the record shows merely "forty-six pounds." (R. 120)

B. It is argued that "only one-half pound *of pressure* was required" whereas the report refers to one-half pound of "total force" (R. 158). There is no equilibrating factor given in the report between pressure and force.

C. It is argued that only seven and one-half pounds of pressure per square inch was required to force the ball to the top of the check body whereas the report speaks of total pressure required to force the ball "into its normal position" without specifying the required pressure when the ball was stuck.

More important than any analysis of the expert testimony, is the fact that respondent's theory was supported by a multitude of physical facts. In perfect rebuttal to petition-

er's theory of "physical impossibility" are the words of Chief Judge Phillips:

> " . . . but the physical facts demonstrated that the needle valve had become open . . . " (p. 268 of the opinion)

Conclusion

Petition for writ of certiorari should be denied because petitioner was not prejudiced by trial court's ruling denying right of inspection of written report not used by witness to refresh his recollection.

Respectfully submitted,

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